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SOME WORDS

TO

THE SHAREHOLDERS

OF THE

COMSTOCK TUNNEL COMPANY

BY

FRANK J. SYMMES



SAN FRANCISCO, CAL.

AUGUST 25, 1890.



*To the Shareholders of the Sutro Tunnel Company:*

About a year ago, and immediately after the incorporation of the Comstock Tunnel Company, the undersigned published an Address to you as Sutro Tunnel shareholders, urging you to retain your Sutro certificates and shares—as we have done—and asking you to stand by us in our suit for restoration of the property. Many of you may have received that address. Some may have questioned it, as one might well deem it impossible that such statements could be true. They may be doubted, but not disproved.

We ask your attention to the condition of affairs to-day, quoting from the sworn statements, as given in the Answer to our suit, being the confessions of your President,—duly elected, you are told, but not appearing as a stockholder upon your books,—and which uphold the truth of our former address.

Under date of April 28th, 1890, Mr. Theodore Sutro published a “Synopsis of the Answer of the Comstock Tunnel Company and others, in the suit of Frank J. Symmes and others against the Union Trust Company of New York and others, pending in the Circuit Court of the United States, District of Nevada.”

He states to you there that “A suit in equity has been brought in the Circuit Court of the United States, District of Nevada, by Frank J. Symmes, Joseph Aron and F. H. Wheelan, *claiming to be stockholders* of the Sutro Tunnel Company, against the Union Trust Company of New York, the Comstock Tunnel Company, the Sutro Tunnel Company, the Trustees of the Sutro Tunnel Company, the Executive Committee of

stockholders of the Sutro Tunnel Company, the Re-organization Committee, and the Guaranty Syndicate."

The insinuation that we are not stockholders is childish and ridiculous.

Whilst the suit is nominally against all the parties named, it is actually against MR. THEODORE SUTRO, *the Guaranty Syndicate*, and the very few other individuals who have been benefited, or are to be benefited, in money, bonds, shares or fees, by the foreclosure of the mortgage and the selling out of the Sutro Company.

For the purposes of this article, let us embrace these true defendants in one class and call them the Conspirators. And for the purposes of this article, allow us to except them from the title when we speak of the Comstock shareholders—for the Conspirators as stockholders have been apparently interested always for themselves, not for the entire Company, either Sutro or Comstock. They constitute a unique and peculiar class of their own.

Mr. Sutro states to you on page 2 of his Synopsis—"The bill of complaint in this suit contains so many mis-statements and misrepresentations, all of which have been widely circulated through the public press and otherwise, that I herewith give you a synopsis of the answer (retaining the language as far as practicable) of the principal defendants in the suit, which contains the first full and correct statement of *all* the FACTS involved in the controversy, that has yet appeared in print, and which, *in my judgment*, is in itself a complete refutation of the unwarranted charges, and *fully disposes* of the groundless demands of Mr. Symmes and his fellow-malcontents."

It *does* contain some facts not previously known, and which nothing less than a demand before a U. S. Court

could draw out,—for instance the amount of money paid by the Syndicate (\$800,000) for the mortgage on the property, which was foreclosed under Mr. Sutro's confession of judgment at \$1,420,209.46, with forty-eight days interest at ten per cent. (\$16,338) to be added.

It does *not* contain a proper explanation of how he, as President of the Sutro Tunnel Company, had any legal or moral right to engage in the purchase of a mortgage at this smaller sum, give the benefit of the purchase to an outside Syndicate, and confess to a judgment against the Company for some \$630,000 more than the mortgage cost.

It does *not* state that whilst the Sutro Company paid him a salary of \$500 a month, he applied for a fee of \$100,000, which request was declined, and that only after that refusal was it discovered that a new Company was necessary.

Let us review Mr. Sutro's "Answer," which has been duly sworn to, and which, *he says*, contains "all" the facts. As to its "fully disposing" of our demands, we prefer to entrust those to the Courts rather than to Mr. Sutro's "judgment," in which we have long since lost all faith, and, notwithstanding this masterly "Answer," our suit will be prosecuted to a final judgment.

He tells you, on page 1, that, "The *main purpose* of this suit, as stated in the bill of complaint, is to have it declared that the Comstock Tunnel Company holds the legal title to the rights and property formerly owned by the Sutro Tunnel Company, as the constructive trustee of the Sutro Tunnel Company; and that, in equity, the conveyance of said title, rights and property to the Comstock Tunnel Company, under and in pursuance of foreclosure proceedings against the Sutro Tunnel Company, is a mortgage to secure the payment of an alleged indebtedness of the Sutro Tunnel Company,

the amount of which it is sought to have ascertained, upon an accounting which is asked for, and which ascertained indebtedness the complainants seek to have evidenced by the bonds of the Sutro Tunnel Company, which they pray that the Trustees of that Company may be ordered to issue. *The effect* of this would be, that the shares of the stock of the Sutro Tunnel Company which complainants claim to own, and upon which they have not made the payments called for by the plan of reorganization of the Sutro Tunnel Company, would be of the same value as the shares of the large majority of the stockholders who have, in good faith, paid their proportion in cash towards such reorganization."

The purpose of this suit is correctly stated. The effect would be also as stated—that many shares of the Sutro Company would remain of value to the original holders. At the same time, *your shares* would be increased in value, by the reduction of your debt, not less than a million dollars, and the Syndicate would be paid only \$50,000 in cash, \$200,000 in bonds, and six per cent. interest on its advances. This is the greatest injustice we seek for the Syndicate in the suit which we have instituted. Why should they ask, or be permitted to receive, more?

We claim that the title to the property was conveyed to the Union Trust Company as a trustee to secure the payment of advances and to save any unnecessary reorganization or any new Company; that foreclosure was an extravagant and unnecessary expense; that the formation of a new Company was more extravagant and unnecessary, and that the transfer of the royalty contracts with the Comstock Mines to a new corporation has most seriously imperiled the value of the entire property.

We claim that, to gain their benefits and fees at the

earliest possible moment, the Conspirators have been willing and ready to risk and sacrifice everything and everybody. Mr. Sutro dwells upon *the effect* of our suit to make the shares of the stockholders of the Sutro Company upon which no payments have been made of the same value as those which were surrendered with your bond subscriptions, and upon which you contributed "your proportion in cash toward reorganization."

If a railroad or other corporation needing funds offers its bonds to the shareholders, *pro rata*, and if not all taken by such shareholders, as offered, does the company declare the unsubscribed shares void? Could it do so? Your stocks and bonds are quite distinct from each other, and were simply tied together long enough to swing you around as the Conspirators desired.

We declare reorganization, as carried out, a delusion and a fraud, and for the benefit of none but the Conspirators. For your "*cash*" advances you received bonds absolutely independent of your shares, and Sutro (not Comstock) bonds should have been issued to you. The shareholders in the old Company not contributors to the bond plan, would, by our method, still have shares of some value, but no bonds. But in the Comstock Company not only the shares represented as unsubscribed, but bonds to accompany them, go to the *Syndicate*—and you, as Comstock shareholders, are far worse off than you would be as Sutro stockholders,—for your property is impoverished by just this number more of bonds which they receive—\$551,988.

Page 8 of the Synopsis refers to a meeting of "*a few*" of the New York stockholders of the Sutro Tunnel Company, held January 12, 1887, and states, on page 9, "At that meeting, stockholders, representing about 165,000 shares were present, and took the first steps towards *saving the property to all the stockholders*." At

the outset the interests of *all* the stockholders were apparently considered. At that meeting (page 9), "Herman R. Baltzer, Horace H. Thayer and Otto Loewengard were appointed as an Executive Committee." This Committee, you will notice, was the outgrowth from the "*few*" stockholders referred to, and although afterward conducting nearly all the business affairs of the Company, was never authorized or appointed by the Trustees, and has never possessed any rightful authority. Also (page 9), "And it was agreed and understood between Theodore Sutro and the stockholders who employed him, that they should pay him the sum of *one hundred thousand dollars*, as compensation for his services, on the condition precedent of his final success in preventing the foreclosure of said mortgage *by and in the interest of McCalmont Brothers & Company*." If by the "stockholders who employed him" is intended *all* the stockholders of the company as represented by the Board of Trustees—the only ones whom he had a right to serve whilst acting as their President and Attorney in fact—then is the answer entirely false, for the reason that the Trustees refused to consider a request for the hundred thousand dollars, believing that Mr. Sutro's services were well paid for in the salary of \$500 a month.

If the answer confesses that the "few stockholders" referred to contracted to give Mr. Sutro "previous to January, 1887," \$100,000 to buy this mortgage *for them*, it betrays the early conception of a wicked and unlawful scheme which later acts have so faithfully carried out, and which bears no countenance of honesty, justice, or of law.

On page 13 (line 2), it is stated that the attorneys for the mortgagees "finally, on the 12th day of July, 1887, agreed to accept a proposition made by said

Sutro on the 21st day of May, 1887," and (page 15) "On November 15th, 1887, the Executive Committee issued and recommended to the stockholders a plan of reorganization, *without foreclosure, if possible.*" Note these dates—the settlement made July 12th, requiring payment of a million dollars January 1st, 1888, and the Executive Committee issuing a plan on November 15th. More than four months exhausted in preparing a plan, and but six weeks' time for the stockholders, scattered over two continents, to raise the money. Do these statements indicate that even at that early time the so-called Executive Committee desired the stockholders to raise the full amount? The Syndicate might not then have been born, but surely it had been conceived.

On page 18, we are told "that the rights of the Sutro Tunnel Company therein terminated on January 1st, 1888." Yet for months after that we were urged to complete our subscriptions.

We are told (page 17) that "only about 800,000 shares or \$400,000 subscribed under the call before the first of January, 1888"—probably all that could be expected in the time allowed. Again (page 18), we are told that "both prior and subsequent to Jan. 1st, 1888, Theodore Sutro made every possible effort to induce counsel to extend the time for payment—but they wholly refused to do so." And yet (page 31) we learn that "June 21st, 1888, the sum of \$800,000 was paid" for the mortgage. How is it that so much time could be had for the benefit of the Syndicate and so little offered to the stockholders?

Page 19 of the Synopsis states, "Theodore Sutro determined not to cease his efforts to *save the property of the Company to its stockholders*, or to so many of them as still would subscribe to bonds," and every invitation and every circular held out to the subscribers that buying

the bonds was to be in itself a most excellent investment, and that by so doing the property was to be saved from foreclosure. Previous to April 27th, 1888, the Syndicate had been in embryo, and its formation not made known. At this date, however, its slimy form appears, and we are asked to consent to a modified form of reorganization, and upon payment of our subscriptions the Syndicate would advance what further sums might be necessary to purchase the mortgage, and proceed "without foreclosure or with foreclosure and purchase of the property." It had always been held to be without foreclosure if possible, and the Syndicate agreement was approved and authorized by the Trustees August 10th, 1888, only "so far as it relates to non-foreclosure."

Page 21 states, that after the money was obtained, it was to be used "toward the purchase of the mortgage or toward the buying of the Sutro Tunnel Company at foreclosure sale, in case it became necessary or advisable to adopt that plan." The plan to foreclose is growing bolder. Let us see if the latter course *was* necessary or advisable.

On page 31, we are told that the Union Trust Company purchased the McCalmont mortgage "June 21st, 1888, for the sum of \$800,000," with the moneys *subscribed and paid by the stockholders and by the Syndicate.*" At this date we are told (page 24) that "the sum of \$446,748.50 was paid in full *by stockholders.*"

At the same date the Union Trust Company had been paid by the Receiver about \$150,000 more.

We have never been permitted to learn the total amount paid in by the stockholders toward the purchase of the mortgage, but page 39 states that "the number of shares represented by subscriptions to bonds was 1,448,012. Page 24 admits that *on June 21st, 1888, 893,497 shares had paid \$446,748.50.* Of the 544,515

shares which paid after June 21st, let us assume one-half at fifty-five cents, and one-half at sixty cents, making in all

1,448,012 at 50 cents,	\$446,748.50
272,257 at 55 cents,	149,741.35
272,258 at 60 cents,	<u>163,354.80</u>
and we have \$759,844.65	

as the total paid by subscribers.

The Receiver had paid to the Union Trust Company as the net income from the property during his term, \$254,000; so that the Trust Company had received from us and from our property about \$200,000 more than the mortgage ever cost.

And we intend to show on trial that at the time the mortgage was finally bought more money had thus been paid in by us and by the Receiver than would suffice for the payment of the mortgage at the sum agreed upon; and, therefore, no actual necessity for the Syndicate's services would ever have existed if the same interest had been shown in obtaining the mortgage for us as for others.

It is more than a year since we announced our suit. Your attorneys published to you then that we meant nothing and could accomplish nothing. When we filed our complaint, they claimed to be eager for the issue, and would press the suit to trial. Their answer alone would demolish us. Your Trustees pacified you with an "Approximate Statement" about January 1st, when you were comforted with the remark that our suit was "without merit or foundation, and would probably be of short duration." It is necessary, therefore, that you should know a little of our side of the story, and understand that we are all in the same boat, and that our fight is your fight. Even the Conspirators on the outside would be better off to join us. Their

courage to meet the suit seems now oozing away. Six times they asked for an extension, which we granted. Then came the Answer which was to use us up—ninety pages of it. Then we had it in synopsis form—forty-eight pages—but survived it all. Now, after nearly a year, and reaching this point in the suit—and the progress of the courts is slow enough, at best—your hundred-thousand-dollar attorney appears upon the Pacific Coast, and a motion to dismiss is made upon a technicality of non-jurisdiction—that we, the complainants, are not residents of the State of Nevada. What can he possibly gain by thus evading the issue? Is he afraid of it? In any case, does such a course indicate strength, and does he not know that to gain this point would perhaps cost another year's time to bring the suit to the same point of progress in another court? Are not your interests endangered by every month of delay? Surely he cannot imagine that we have entered this suit to be in the least overcome or exhausted by a decision, if against us, upon a trifling point like this, else he has but feebly measured our strength. But how little does he consider your interests by such a course. Probably a quarter of a million of unpaid royalties are to-day locked up in dispute, a great part, or all, of which may be lost in the end by such childish proceedings. The main feature of the defense lies in a claim that all the efforts and exertions of the reorganization committee were conducted (page 8) "with a view to saving its property and rights to the stockholders, as against foreclosure *in favor of McCalmont Brothers & Co.*" How ridiculous, that a foreclosure in favor of Smith is preferable to one by Jones! Do you know or care whether the mortgage was foreclosed by a Seligman or a McCalmont?

Ah, but they say, you have been permitted to join with the Syndicate in the purchase of bonds, and thus

partake of the benefits of the reorganization. Have you found your bonds a fine investment? Are they worth what you paid for them? Would you not be thankful to-day if the foreclosure had been left to McCalmont Brothers & Co. and you had not been *let in* on this privilege? On page 39 you are told that "the property of the Sutro Tunnel Company, excepting certain blocks of land in the town of Sutro, was bid in by the Union Trust Company, at a sale thereof, had under the decree on January 14, 1889, for \$1,325,000." Ask your private attorney why, when there was but one bidder, should such an enormous sum be bid for the property when it was known that the court and sheriff fees and expenses are thereby so largely increased? He will tell you that it was to *prevent, if possible, any redemption* of the property, and to raise the indebtedness of the Company to as high a sum as possible. And when you are told (page 41) that the Syndicate "has not been reimbursed in the sum of \$272,742.40 advanced by it under its guaranty," do you not consider that we are justified in demanding an accounting for the sums acknowledged as received from our subscriptions, and from the Receiver, amounting to a million of dollars? And do you not know that this last effort of your President to make a settlement with the mining companies *at any reduction whatever* from the royalty rate, which after much contest and resistance has been adjusted and accepted by all those companies, is to open up a fresh resistance upon their part to their contracts, burdensome, it is true, to them, but which are the sole practical value of our property? We consider this one of the most impolitic, unbusiness-like and dangerous acts of his which we have ventured to criticise. Had we not notified the mining companies of our suit, and that we should hold them responsible to the *Sutro Tunnel Company* for payment.

of the royalties, and did they not recognize the importance of our suit and *the strength of our situation*, do you not suppose they would have been very glad to accept a discount of twenty-five per cent on a year's royalties, and a new adjustment for the future? The officers of these companies are here in our midst, and know us and the situation, and apparently have more faith in our side of the question than in theirs.

If you examine your stock ledger, you will find among the first shares issued are 142,000 (in seven pieces) to H. R. Baltzer, chairman Reorganization Committee. Of these shares the following were transferred: to Charles D. Lithgon, 5000; to F. Strauss, 25,000; to P. C. A. M. Van Weel, 5000; to Edwin R. W. Potter, 5000, and to Frank W. Clinton, 92,000. Such shares as these, apparently issued without consideration, would naturally resist our suit, and hence from such a direction you cannot look for any adjustment but that of their own making, and you will need a thorough organization, with a proxy from *every small shareholder* placed in the hands of some reliable person for use at the October meeting, if you desire or expect any change from the present management. A million shares are not easily gathered together under one control, and you need to be quite sure how your proxy is to be used before you give it away.

In our former address we called your attention to the fact that President Sutro held but ten shares of the two million of the old Company. We have searched your stock ledger through, and cannot find that he owns *one* of your Comstock shares to-day, and apparently he has never been properly qualified to act as your President. From a lack of the proper interest on your part, your property has been thus recklessly managed in the interests of a few, and to look into the depths of matters, as we have done, would indeed surprise you.

Now a word as to ourselves: If we had not large interests of our own, we could never afford to undertake a contest involving so great an expense, and which we have measured to the end—even to the U. S. Supreme Court—before entering it. We have many thousand dollars locked up in the Sutro certificates, making our interests identical with yours, and which we refuse to give up; we are much nearer to the property than either you or your managers; we have been familiar with it for years; and we stand upon a well-established reputation in the community where we reside.

You neglected our suggestion of a year ago, that you join us in refusing to accept the Comstock bonds—and, now that you have them, you can draw no interest upon them. The Sutro certificates bore interest, as doubtless many of you know. You have allowed the Conspirators to go on at their own sweet will, and you have accepted a President who cost the old Company some \$35,000, and ruined it, and to whom you have presented \$100,000 apparently to repeat the operation with the new. You have now two law suits on hand, with a prospect of one with each of the other twenty-five mines upon the Comstock before you have a dollar of income. Your property is going to ruin; your anticipated royalties are tied up; you have *no income and enormous expenses*, and your stocks and bonds are of little value. And, with a reckless disregard of your interests, your President has recently offered to the Comstock mining companies a discount of twenty-five per cent. of all your claims for a settlement. The sole value of your Company lies in these contracts with the various mining companies. To collect a few dollars, and make a little show of progress to you, Mr. Sutro *has thus offered to give away one-quarter of your property*—for a concession of this

kind once obtained, the mining companies will never pay as before. They are already seeking the opportunity to escape it altogether, and they will not hesitate to employ every means to that end. He has thus imperiled the whole property by forming a new Company, and if the Comstock mines may elude the payment of royalties, your stocks and bonds are not worth a bean. Your only safety lies in the plan which we insist upon.

We demand that affairs be put back to the point where we owed *just* \$800,000--and had an income from royalties of \$275,000 a year. Let the syndicate then be paid, in accordance with the first terms of the Syndicate agreement—a very handsome sum for its guaranty; let the Sutro bonds and shares be issued to the subscribers, as a substitute for the Comstock, and the Sutro Company maintained, so that no risks or litigation need occur over the royalties, and let this foolish foreclosure scheme be ignored. And, above all things, give us a Board of Management and a President composed of stockholders of interest who will develop the property and use the first elements of common business sense in its management. It would arouse some of you fully to our views if you would study your books a little—as we have done—and see how much has been spent in unnecessary fees and expenses during the past three years—and into whose pockets it has gone. The most ardent Syndicate supporter cannot but own that the present management is a failure. Reform the management, and come down to common-sense and business principles, and do not let one man, who does not own a single share of stock in the Company he claims to be the President of, rule and ruin your interests. The simplest of arithmetic will prove to you that by our method, with a Sutro Company owing \$800,000 in bonds, instead of your Comstock

Company with \$2,200,000, your two million shares are immediately advanced in value just *seventy cents each*—to more than five times their present value. The royalties are then undisputed, the income regular, the bonds unquestioned, and their value correspondingly increased. WE SHALL WIN IN TIME, and the more you investigate the matter, the more you will agree with us, whilst the earlier you join us, the better for all. It is even to be questioned if by our method the syndicate itself—the chief element and strength of the Conspirators—would not be much better off. They hold many shares and many bonds. In the greatly increased value of these under a freedom from vexatious and expensive litigation, and by the legitimate benefits derived from the judicious handling of the property, they could doubtless well afford the loss of many bonds and shares as awarded by the present extravagant plan of reorganization. If you could know who it is that is dealing in the stock you might judge of the amount of confidence or otherwise which they have in it. Probably but a very small portion of the stock sold ever gets to the office for transfer, but a study of your stock ledger will show you that the following transfers have been made from F. Strauss (J. & W. Seligman & Co.) to other parties: in November, 1889, 37,272 shares; December, 18,454; January, 1890, 10,008; March, 100; May, 8,000; June, 2,000, and July 2,050 shares. What do you infer from this apparent willingness on the part of the insiders to let the dear public have their stock? We have read, studied and copied your stock ledger, and we find that your President and one other Trustee own no shares in your Company, and hence are entirely disqualified from serving you; one Trustee owns eight shares (market value, \$1.56); two others are accredited with one hundred shares each, and one with four hundred shares. Only one of these Trustees

has a sufficient interest to be properly entitled to occupy so important a position. What can you expect but a one-sided management under such circumstances? And is it not quite time to wake up to the situation?

These words are worthy your earnest attention. Our statements of last year have been supported, and those from your Trustees have *not* been borne out. Read your President's "Approximate Statement" of last December, and see how it may strike you now. If you neglect to place in power a wise and careful management at your election October 20th, you may count your property of but little value. Are you prepared to place your proxy in reliable hands? If so, do not neglect to communicate at once with FRANK J. SYMMES, 222 Sutter Street, San Francisco, Cal.

FRANK J. SYMMES, 222 Sutter St., San Francisco, Cal.

JOSEPH ARON, 30 Rue Bergere, Paris, France.

FAIRFAX H. WHEELAN, Santa Barbara, Cal.

*Complainants.*

SAN FRANCISCO, August 25, 1890.







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